COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-1835 and 00-1919-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NO. 00-1835

IN THE MATTER OF THE REFUSAL OF
MICHAEL P. FLUNKER:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL P. FLUNKER,

DEFENDANT-RESPONDENT.

NO. 00-1919-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL P. FLUNKER,

DEFENDANT-RESPONDENT.

APPEALS from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 DYKMAN, P.J. These appeals arise out of a combined refusal and suppression hearing in an Operating a Motor Vehicle While Intoxicated (OMVWI) prosecution.[1] The trial court concluded that the police officer who stopped and then arrested Michael Flunker did not have a reasonable suspicion that Flunker was engaging in illegal activity. Accordingly, it granted Flunker's motion to suppress evidence of his intoxicated driving. The court also concluded that because the officer lacked reasonable suspicion, Flunker was not lawfully placed under arrest. *See* WIS. STAT. § 343.305(9)(a)5 (1997-1998).[2] The court therefore

[1] This is a consolidated appeal of a criminal prosecution against Flunker for OMVWI and a hearing pursuant to WIS. STAT. § 343.305(9) to determine whether Flunker properly refused to take a breath, blood, or urine test.

[2] All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise noted. WISCONSIN STAT. § 343.305(9)(a)5 states in part:

> 5. That the issues of the hearing are limited to:
>
> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.
>
> b. Whether the officer complied with sub. (4).
>
> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is

(continued)

dismissed Flunker's "refusal issue."[3] We conclude that under the circumstances, a police officer would have had a reasonable suspicion that Flunker was engaging in unlawful activity. We therefore reverse the part of the trial court's order dismissing the "refusal issue" and remand for further proceedings, with instructions to address the § 343.305(9)(a)5 issues in light of this opinion. We also reverse the part of the trial court's order suppressing evidence, and remand for further proceedings consistent with this opinion.[4]

¶2 Flunker stopped his Infiniti automobile at a stop light on East Washington Avenue in Madison. When the light turned from red to green, a City of Madison police officer's attention was drawn to the car when he heard the loud sound of tires squealing. The car's tires were spinning rapidly just prior to the vehicle lunging forward and accelerating rapidly. The officer stopped Flunker's car, and after inquiring into Flunker's physical condition, arrested him for OMVWI.

¶3 Stopping an automobile and detaining its occupants is a seizure under the Fourth Amendment to the United States Constitution. ***State v. Guzy***, 139 Wis. 2d 663, 674, 407 N.W.2d 548 (1987). Whether a stop constitutes an illegal search and seizure in violation of the Fourth Amendment is a question of

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> shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

[3] While the trial court's opinion dismissed the "refusal issue," WIS STAT. § 343.305(9)(d) provides that if one or more of the issues at the refusal hearing are decided favorably to the defendant, the trial court shall order that no action be taken on the defendant's operating privilege on account of the defendant's refusal to take a blood, breath, or urine test.

[4] The State also argues that whether reasonable suspicion existed to support the traffic stop "is not an issue to be determined at a refusal hearing." Because we conclude the stop was lawful, we do not address this issue.

law that we review de novo. ***State v. Baudhuin***, 141 Wis. 2d 642, 648-49, 416 N.W.2d 60 (1987).

¶4 An officer must have reasonable suspicion of illegal activity in order to justify an investigative stop. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). Reasonable suspicion is based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21. Reasonableness is an objective standard that is measured by looking at the "totality of the circumstances." ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

¶5 In addition to the facts we have recited, pursuant to WIS. STAT. § 902.03(1)(a) (1999-2000),[5] we take judicial notice of a Madison city ordinance stating that "it shall be unlawful for any person to operate a light motor vehicle such as to cause excessive noise levels as a result of … unnecessary rapid acceleration … or *tire squeal* ...." Madison General Ordinance 24.09(5). (Emphasis added.) Additionally, pursuant to WIS. STAT. § 902.01 (1999-2000),[6] we note that the location of the stop was within the City of Madison.

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[5] WISCONSIN STAT. § 902.03(1) (1999-2000) states in part:

> The courts of this state, including the court of appeals and the supreme court, shall take judicial notice of:
>
> (a) County and municipal ordinances in those counties in which the particular court has jurisdiction.

[6] WISCONSIN STAT. § 902.01(2) (1999-2000) states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following:
>
> (a) A fact generally known within the territorial jurisdiction of the trial court.

(continued)

¶6 We conclude that under the totality of the circumstances at the time of the stop, specific and articulable facts permitted a police officer to reasonably suspect that the driver of the vehicle was violating a city traffic ordinance.[7] The police officer therefore validly stopped Flunker's vehicle.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

(b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[7] Standards such as "probable cause" and "reasonable suspicion" are purely objective; the test is what a reasonable officer would conclude, and the officer's subjective state of mind is irrelevant. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997). Here, the test is whether a police officer would have reasonably suspected that Flunker was violating Madison General Ordinance 24.09(5). *See* ***State v. Washington***, 120 Wis. 2d 654, 660, 358 N.W.2d 304 (Ct. App. 1984), *aff'd*, 134 Wis. 2d 108, 396 N.W.2d 156 (1986). We therefore do not consider the arresting officer's observations about the stop, other than his recitation of historical facts.